

Transnational Business Law

Part C.1 : IMPORT / EXPORT

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PRESENTATION OUTLINE

- I. Introduction to Import/Export**
- II. CISG (Convention on International Sales of Goods)**
- III. Soft Law in international practice**
- IV. Negotiation and legal design of international contracts**
- V. Practical aspects of international distribution**

I. Introduction to Import / Export

A. Definition & Context

B. Legal frameworks

C. Risks & Challenges

D. Role of legislative harmonization

E. Key legal instruments

A. Definition & Context

- International sales of goods: commercial transactions where buyer and seller are established in different countries
- Involves physical transfer of goods + interaction of different legal systems
- Various forms: B2B contracts, long-term supply agreements, framework agreements, purchase orders

B. Legal frameworks

- Multiple legal frameworks (complex network) :
 - Domestic context : each party governed by its national contract law
 - Cross border context : international treaties and conventions harmonize principles and substantive / material rules between contracting states
 - Private international law (conflict-of-laws rules): determines competent jurisdiction and applicable law
 - Soft law: non-binding but influential instruments (Incoterms, UNIDROIT Principles, model contracts)

C. Risks & Challenges

- Purpose of PIL : Determining the competent jurisdiction and applicable law
- Differences between legal traditions (civil law and common law)
- Cost of legal uncertainty and litigation
- Language and cultural barriers
- Enforceability of State Court judgments or arbitral awards

D. Role of legislative harmonization

- PIL-rules permit legal predictability and reduce transaction costs
 - Conflict-of-jurisdiction rules : Brussels I bis Regulation
 - Conflict-of-laws rules : Rome I / II Regulations – Hague Conventions
- Legislative harmonization: domestic vs. international context
 - Domestic context: harmonization / uniformization by EU directives
 - International context: CISG + soft law (Incoterm + Unidroit9)
- Positive effects and benefits of legislative harmonization:
 - Less need to negotiate applicable law each time
 - Limits forum shopping
 - Provides neutral, fair legal frameworks
- No need of conflict-of-laws rules if legislative harmonization is achieved to 100%

E. Key legal instruments

- **CISG**
 - Uniform legal regime (substantive / material rules) for international sales of goods contracts between companies established in contracting States or with connection to the law of a Contracting State
 - Widely ratified / entered into force and applied by State courts and arbitral tribunals
- **Incoterms**
 - Clarify the parties' obligations, risk transfer, transport, customs responsibilities
 - Standardize General Terms and Conditions in an international context

E. Key legal instruments

- **Rome I**
 - Determines the law applicable to contractual obligations in civil and commercial matters
 - Emphasizes party autonomy, but contains also objective connection rules and includes mandatory (overriding) rules for protection of the “weak” party
 - Do not confuse:
 - Mandatory national provisions (*ius cogens*): provisions of a national applicable law that cannot be derogated contractually
 - Mandatory overriding provisions (*loi de police*) : provisions of a national (not applicable) law that shall have immediate application (art. 9 Rome I)

E. Key legal instruments

- **International commercial arbitration**
 - Resolves disputes outside the authority of State courts
 - Ensures neutrality, flexibility, celerity, confidentiality, enforceability (e.g., New York Convention)
 - Private (contractual) justice vs. State Courts justice
 - Alternative method (ADR) with jurisdictional authority (arbitrators = judges!)
 - Parties may choose between
 - Institutional arbitration (e.g. International Arbitration Court of CCI / Paris)
 - *Ad hoc* arbitration
 - Legal framework of international commercial arbitration
 - Statutory Provisions of national (French) law : art. 1454 and ss. CPC
 - Soft Law of an arbitral institution: e.g. CCI Arbitration Rules

II. CISG (Convention on International Sales of Goods)

A. CISG's role in cross border sales contracts

B. Scope of application

C. Advantages & Limits

D. Legal structure of the CISG

E. Key provisions

F. The principle of party autonomy

A. CISG's role in cross border sales contracts

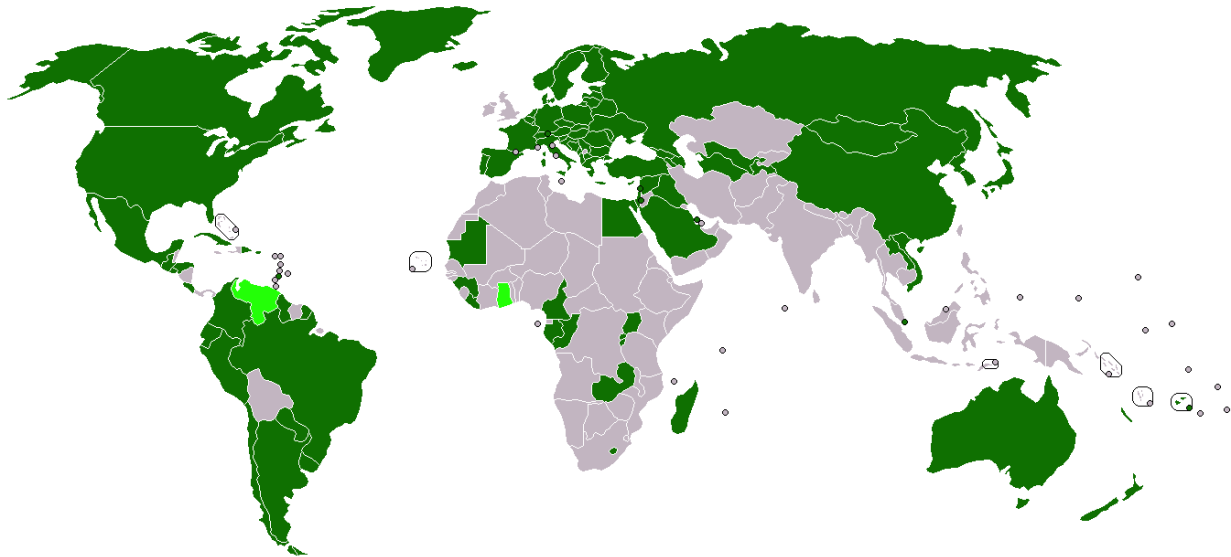
- **Economical role in international trade**
 - More than 97 contracting States worldwide
 - Direct application provided that legal conditions are met
 - Applicable to all export contracts of European (besides: UK and P) companies
 - Also applicable to most import contracts:
 - If the contracting party is established in a CISG Contracting State
 - If the national law of a Contracting State is applicable to the contract under the PIL rules (Rome I Regulation – 1955 Hague Convention)
 - Exception: exclusion (express or implied) by the parties (art. 6)

A. CISG's role in cross border sales contracts

- **Economical role in international trade**

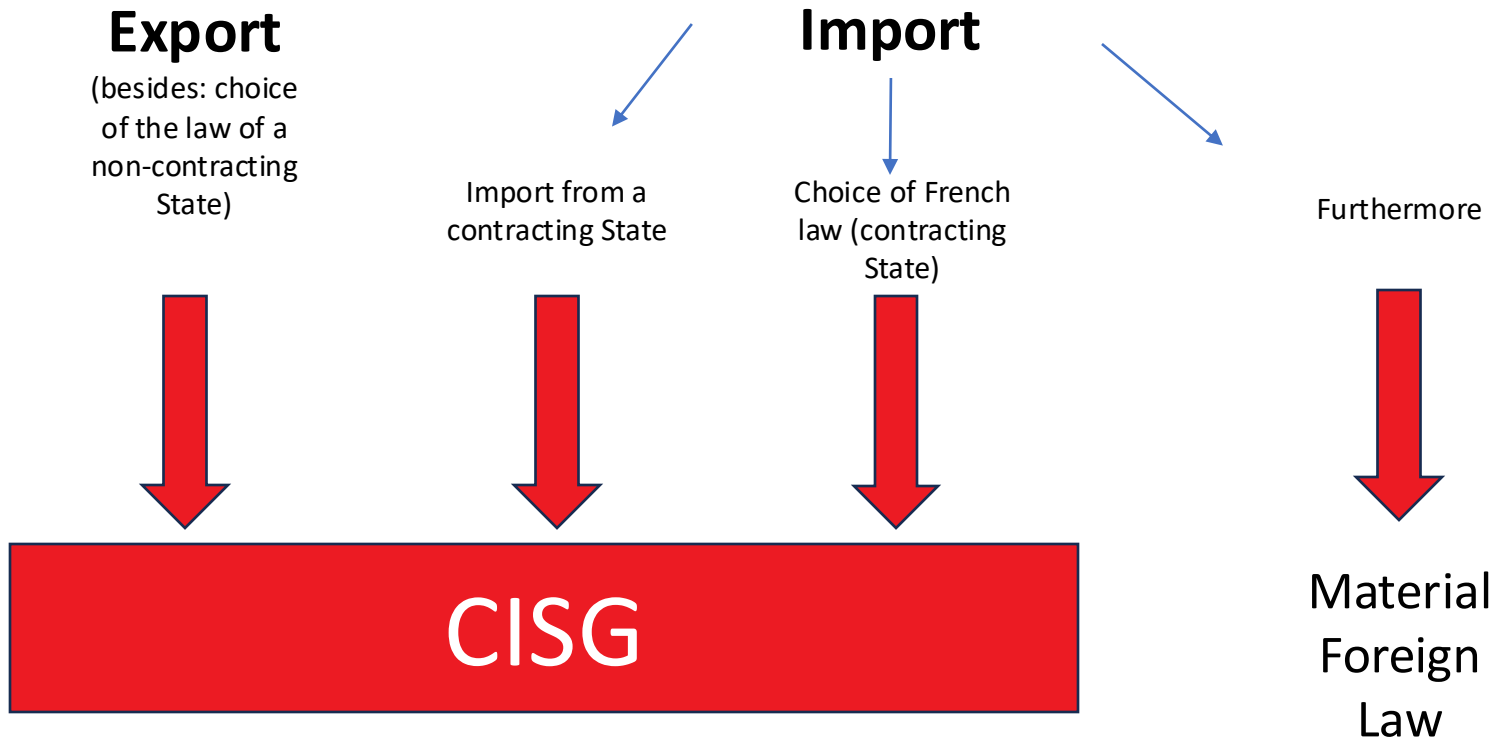
Green = ratified

Light green = signed but not ratified



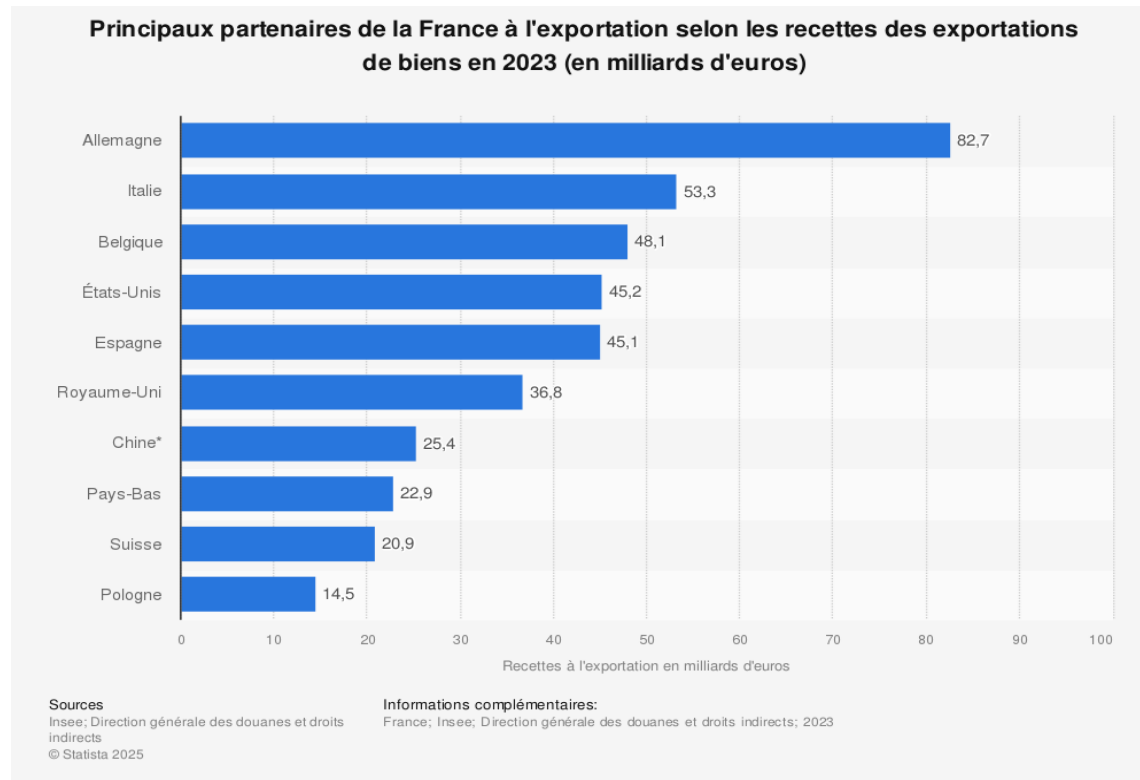
A. CISG's role in cross border sales contracts

- Economical role in international trade



A. CISG's role in cross border sales contracts

- **Economical role in international trade**



B. Scope of application

- Scope of application (*ratione personae* and *ratione materiae*)

Ratione personae

1. Parties with residence in different Countries



2. Connection with at least one Contracting State

Residence
of both
parties in
Contracting
States

Rules of PIL
lead to the
law of a
Contracting
State

Ratione materiae

1. Applicable to international contracts for the sale of goods

2. Not excluded in articles 2 and 3 of the CISG (e.g. consumer goods, auctions, ships)

B. Scope of application

- **Scope of application (*ratione personae*)**

Examples :

- French seller + German buyer → both countries are Contracting States → CISG applies
- French seller + UK buyer :
 - UK is not a Contracting State → art. 1(1)(a) CISG does not apply
 - Art. 1(1)(b) : rules of PIL lead to French law (seller's law) → CISG applies

B. Scope of application

- **Scope of application (*ratione materiae*)**
 - CISG is applicable to:
 - Contracts for the sale of movable objects (including software)
 - Exchange contracts in the form of counter-purchase agreements
 - Master distribution agreements, insofar as they contain obligations related to the sale (and not distribution)
 - Supply contracts where the buyer does not provide an essential part of the required material elements
 - Mixed contracts (e.g. development contracts) if the predominant part relates to sales.

B. Scope of application

- **Scope of application (*ratione materiae*) :**
 - Matters regulated by the CISG
 - Conclusion of the contract
 - Rights and obligations of the buyer
 - Rights and obligations of the seller

B. Scope of application

- **Scope of application (*ratione materiae*) :**
 - Matters not regulated by the CISG (art. 4 and 5)
 - Validity of the contractual clauses
 - Transfer of ownership
 - Seller's liability for death or physical injury caused to any person by the goods
 - Mechanisms of general law of obligations (assignment, subrogation, compensation, limitation period)

B. Scope of application

- **Scope of application (*ratione materiae*) :**
 - Excluded contracts under art. 2 and 3 CISG
 - Sales to consumers (unless seller was not aware of this usage)
 - Sales of shares, commercial bills and currencies
 - Electricity sales (excluding oil or natural gas sales)
 - Distribution contracts (except for obligations relating to the sales)
 - Auctions
 - Sales by way of seizure or any other means by judicial authority
 - Sales of ships, boats, hovercrafts and aircrafts
 - Sales of industrial plants with a predominant share of service contracts.

B. Scope of application

- **Scope of application of the CISG: principle of “opting out”**

- Exclusion (full or partial) through agreement between the parties (art. 6).

Article 6

*« The parties may **exclude** the application of this Convention or, subject to article 12, **derogate** from or vary the effect of **any of its provisions**. »*

- Exclusion may be expressed or implied
 - an agreement of the parties during the negotiations and/or at the time of conclusion of the contract (*electio juris clause*)
 - a pending procedural agreement by reference to provisions of a national law
- **Warning:** the choice of a national law (*« This contract is governed by French law »*) does not exclude the CISG

B. Scope of application

- Scope of application of the CISG
 - CISG application “ratione personae” (geographical approach)

Article 1 CISG

« (1) This Convention applies to contracts of **sale of goods** between parties whose **places of business** are in **different States**:

(a) when the States are **Contracting States**; or

(b) when the rules of **private international law** lead to the **application of the law of a Contracting State**.

(...)»

B. Scope of application

- Scope of application of the CISG
 - Exclusions “ratione materiae”

Article 2 CISG

«This Convention does not apply to sales:

*(a) of goods bought for **personal, family or household use**, unless the seller, at any time before or at the conclusion of the contract, **neither knew nor ought to have known that the goods were bought for any such use**;*

(b) by auction;

(c) on execution or otherwise by authority of law;

*(d) of **stocks, shares**, investment securities, negotiable instruments or money;*

*(e) of **ships, vessels**, hovercraft or aircraft;*

*(f) of **electricity**. »*

B. Scope of application

- Scope of application of the CISG
 - Manufactured goods

Article 3 CISG

«(1) Contracts for the supply of goods to be manufactured or produced are to be considered **sales** unless the party who orders the goods undertakes to supply a **substantial part** of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the **preponderant part** of the obligations of the party who furnishes the goods consists in the **supply of labour or other services**. »

B. Scope of application

- **Scope of application of the CISG**
 - Sale of goods aspects that are covered vs. excluded

Article 4 CISG

*«This Convention governs only the formation of the contract of sale and the **rights and obligations of the seller and the buyer** arising from such a contract. In particular except as otherwise expressly provided in this Convention, it is **not** concerned with:*

*(a) the **validity** of the **contract** or of any of its **provisions** or of any usage;*

*(b) the **effect** which the contract may have on the **property** in the goods sold.»*

B. Scope of application

- **Scope of application of the CISG**
 - Principle of “opting out” : partial or total exclusion of CISG par parties

Article 6 CISG

*«The parties may **exclude** the application of this Convention or, subject to article 12, **derogate** from or vary the effect of **any of its provisions**. »*

C. Advantages & Limits

- **Advantages of CISG :**
 - Uniformity : CISG replaces divergent national laws with a single set of international (substantive / material) rules of sale of goods
 - Neutrality : avoids the need to choose between the seller's or buyer's domestic law

C. Advantages & Limits

- **Advantages of CISG :**
 - Legal security : CISG uses the same rules in all Contracting States (Art. 7), which reinforces legal clarity and certainty (BUT: default of an International CISG Supreme Court)
 - Flexibility : parties can totally or partially exclude or derogate from CISG's provisions (very high degree of contractual freedom)
 - Balance : CISG draws from both civil and common law traditions

C. Advantages & Limits

- **Advantages of CISG :**
 - Largely recognized as a uniform legal regime
 - Simple and practical legal design
 - Flexibility of the legal regime : practices established between the parties – international trade usages – Unidroit principles - Lex Mercatoria)
 - Drafted in several languages
 - Large contractual freedom = large responsibility of each party
 - Protection against national specificities (subject to national mandatory provision)

C. Advantages & Limits

- **Limits of CISG :**
 - CISG does not cover several important aspects of the sales of goods practice : validity, property transfer, subrogation, multi-party liability, mandatory rules etc.
 - For contractual gaps: Rome I / 1955 Hague Convention
 - For non contractual gaps: Rome II / 1973 Hague Convention
 - For property transfer: *lex rei sitae*
 - Reservation possibilities : states can declare exceptions (e.g.: art. 96 declarations limiting freedom from writing requirements)

C. Advantages & Limits

- **Limits of CISG :**
 - Lack of uniform interpretation by national State courts (despite of art. 7): national courts may diverge in their rulings in the absence of an international Supreme Court.
 - Therefore: General tendency of professionals to systematically exclude CISG

D. Legal structure of the CISG

- **Part I – Scope and general provisions (Arts. 1–13) :**
 - Defines when the CISG applies (international sale, Contracting States)
 - Allows exclusion by the parties (Art. 6)
 - Rules on interpretation (uniformity, good faith – Art. 7)
 - Trade usages and party practices (Art. 9)

D. Legal structure of the CISG

- **Part II – Formation of the contract (Arts. 14–24) :**
 - Rules on offers, acceptances, and counter-offers
 - No requirement of written form
 - Defines when and how a contract is formed
 - Offer is not accepted when the “acceptation” (with reference to other GTC) alters materially the offer’s terms : mirror rule + last shot rule

D. Legal structure of the CISG

- **Part III – Sale of goods (Arts. 25–88):**
 - Chapter I – General rules on breach, remedies
 - Chapter II – Obligations of the seller (delivery, conformity, documents)
 - Chapter III – Obligations of the buyer (payment, taking delivery)
 - Chapter IV – Risk of loss (passing of risk from seller to buyer)
 - Chapter V – Common rules (damages, exemptions, contract termination, preservation of goods)

D. Legal structure of the CISG

- **Part IV – Final provisions :**
 - Rules on ratification, reservations, and territorial application
 - Entry into force, amendments, and official language

E. Key provisions

- Scope of application (art. 1 - 6 CISG)
- General provisions of the CISG
 - Interpretation of the convention

Article 7 CISG

«(1) In the interpretation of this Convention, regard is to be had to its **international character** and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning **matters** governed by this Convention which are **not expressly settled in it** are to be settled **in conformity** with the **general principles** on which it is based or, in the absence of such principles, in conformity with the **law applicable** by virtue of the rules of private international law. »

E. Key provisions

- General provisions of the CISG

- Interpretation of statements or other conduct from a party

Article 8 CISG

«(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his **intent** where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the **understanding** that a **reasonable person** of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to **all relevant circumstances** of the case including the **negotiations**, any **practices** which the parties have established between themselves, **usages** and any **subsequent conduct of the parties**.»

E. Key provisions

- General provisions of the CISG
 - Formation of the contract

Article 18 CISG

«(1) A **statement** made by or other conduct of the offeree **indicating assent to an offer** is an **acceptance**. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the **offer** or as a **result of practices** which the parties have established between themselves or of usage, the offeree may indicate assent by **performing an act**, such as one relating to the **dispatch of the goods** or **payment of the price**, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph. »

E. Key provisions

- General provisions of the CISG

- Acceptance with modification

Article 19 CISG

«(1) A **statement** made by or other conduct of the offeree **indicating assent to an offer** is an **acceptance**. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(...)»

E. Key provisions

- General provisions of the CISG

- Acceptance with modification

Article 19 CISG

«(...)

(3) *However, if, by virtue of the **offer** or as a **result of practices** which the parties have established between themselves or of usage, the offeree may indicate assent by **performing an act**, such as one relating to the **dispatch of the goods** or **payment of the price**, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph. »*

-> Mirror Rule & Last shot Rule

E. Key provisions

- General provisions of the CISG

- Definition of fundamental breach

Article 25 CISG

*«A breach of contract committed by one of the parties is **fundamental** if it results in **such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract**, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. »*

E. Key provisions

- **General provisions of the CISG**
 - Conformity of the goods

Article 35 CISG

«(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

*(2) Except where the parties have agreed otherwise, **the goods do not conform with the contract unless they:***

*(a) **are fit for the purposes for which goods of the same description would ordinarily be used;***

*(b) **are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;***

(...) »

E. Key provisions

- General provisions of the CISG
 - Conformity of the goods

Article 35 CISG

«(...)

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of such lack of conformity.

E. Key provisions

- General provisions of the CISG
 - Examination of the goods

Article 38 CISG

*«(1) The buyer must examine the goods, or cause them to be examined, within **as short a period as is practicable** in the circumstances.*

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination. »

E. Key provisions

- **Conformity of the goods and third-party claims**
 - Notice for lack of conformity

Article 39 CISG

*«(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a **reasonable time** after he has discovered it or ought to have discovered it.*

*(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of **two years from the date on which the goods were actually handed over to the buyer**, unless this time limit is inconsistent with a contractual period of guarantee. »*

E. Key provisions

- **Breach of contract by the buyer**
 - Remedies available to the seller

Article 61 CISG

*«(1) If the **buyer** fails to perform any of his obligations under the contract or this Convention, the seller may:*

(a) exercise the rights provided in articles 62 to 65;

(b) claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract. »

E. Key provisions

- Common provisions to the buyer and the seller
 - Exemptions

Article 79 CISG

*«(1) A party is not liable for a failure to perform any of his obligations if he proves that the **failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.***

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(...) »

E. Key provisions

- **Common provisions to the buyer and the seller**
 - Exemptions

Article 79 CISG

« (...)

(3) *The exemption provided by this article has effect for the period during which the impediment exists.*

(4) *The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.*

(5) *Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention. »*

F. The principle of party autonomy in practice

- **The principle of party autonomy**
- **Some practical aspects of party autonomy**
 - (1) The battle of the forms (CISG's legal design : "last shot rule")
 - (2) Opting in of CISG by parties (of non-Contracting States)

F. The principle of party autonomy in practice

- The principle of party autonomy

Party autonomy: important principle in both CISG and arbitration

CISG : Art. 6 guarantees the parties autonomy by establishing that the parties can exclude the application of the CISG or modify any of its provisions. This gives the parties a great deal of freedom as to how they would like the CISG rules to govern their contractual relationship

Arbitration : Art. 1511 CPC :
„The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, where no such choice has been made, in accordance with the rules of law it considers appropriate. In either case, the arbitral tribunal shall take trade usages into account.“


F. The principle of party autonomy in practice

- The principle of party autonomy
 - Party autonomy used by arbitrators as an interpretive standard for filling contractual gaps
 - Filling of contractual gaps for matters not governed by the CISG (**external gaps** in the sense of **article 4**) in the absence of a choice of law
 - Filling of contractual gaps for matters governed by the CISG, but not expressly settled (**internal gaps** in the sense of **art. 7**)

F. The principle of party autonomy in practice

- The principle of party autonomy

Filling of contractual gaps for matters not governed by the CISG (external gaps in the sense of article 4) in the absence of a choice of law



According to **article 4 CISG**, the Convention is not concerned with the validity of the contract, its provision or usage and the effect, which the contract would have on the property in the goods sold.

- In this case **subsidiary national law applies**, which must be **interpreted by the light of the CISG**
- If the parties have **not chosen a subsidiary national law**, the question arises of **how the state jurisdiction or the arbitral tribunal will determine the applicable law.**

F. The principle of party autonomy in practice

- The principle of party autonomy

Filling of contractual gaps for matters not governed by the CISG (external gaps in the sense of article 4) in the absence of a choice of law

Article 1511 CPC focuses on party autonomy in a triple way:

- The article entitles the arbitrator in the case the parties have not chosen the applicable law to their contractual relationship **to apply the rules of law he considers „appropriate“**
- This provision gives the arbitrator a great deal of flexibility (rules of law -> lex mercatoria and UNIDROIT principles)
- The tribunal will always **try to act in accordance with the explicit, implicit or presumed will of the parties** (e.g. trade usages)

F. The principle of party autonomy in practice

- **The principle of party autonomy**

Filling of contractual gaps for matters governed by the CISG, but not expressly settled (internal gaps in the sense of art. 7)

- Article 7 CISG deals with the issue of (internal) gaps in the contract regarding matters governed by the Convention, but not expressly settled by the latter
- In this case, the gaps in the contract must be filled by referring to general principles of the Convention
- In absence of these principles, national law must be applied

F. The principle of party autonomy in practice

- **The principle of party autonomy**
 - This principle is not expressly set forth in the CISG, but has to be deduced from the legal conception of CISG
 - Therefore, since arbitrators dispose of a larger margin of appreciation than State judges, we consider that arbitrators are probably in a better position to go, what the freedom or interpretation concerns, the whole way.

F. The principle of party autonomy in practice

- **Practical aspects of party autonomy**
 - (1) The battle of the forms : Last shot rule
 - (2) Opting in of CISG by parties established in non-Contracting States

F. The principle of party autonomy in practice

- The battle of the forms

The definition of the battles of the forms

- In international transactions, the situation can arise in which the **parties use standard form contracts containing conflicting general conditions**
- Each party will **try to impose their general conditions** in order to ensure their applicability

- The legal framework of the CISG regarding the battle of the forms can be found under **article 19**
The first paragraph of article 19 CISG is based on the **mirror-image rule**.
- In order to conclude a contract, an offer and an acceptance must correspond in all aspects. When the latter contains additions or alterations it must be considered as a counter-offer and not an acceptance.
- **Article 19 (2) CISG** tries to soften the severity of the mirror-image rule by allowing additional or different terms when the offeree's communication was intended to be an acceptance, the terms of the acceptance do not materially alter the terms of the offer and the offeror does not orally object to the altered terms
- However additional or different terms relations to the essential terms of general conditions (e.g. jurisdiction or arbitration clause) are considered to alter the terms of the offer materially (**art. 19 (3) CISG**)

F. The principle of party autonomy in practice

- The battle of the forms
 - The last-shot rule as a complex legal conception:
 - It can be a complex challenge for the courts to determine what the exact terms of the contract are (**art. 8 (2) CISG**)
 - Both scholars and case law consider **that article 19 (2) CISG incorporates the so-called « last-shot rule »**
 - According to this rule, the **terms contained in the last submitted form must be applied to the contract**
 - The last-shot rule is based on the idea that if **no valid objection** has been made within a reasonable period of time, **the party has tacitly accepted the terms**
 - Consequently, **the last person who sends its form** is in control of the terms of the contract and **wins the battle of the forms**

F. The principle of party autonomy in practice

- **The battle of the forms**
 - **The last-shot rule as an out-dated solution**
 - This legal solution is not appropriate for modern and international business, since it can give rise to legal insecurity
 - Therefore, in practice, this solution not only shall be criticized, but both parties and arbitrators should try to avoid it

F. The principle of party autonomy in practice

The means to avoid the application of the last-shot rule

Implicit and explicit exclusion by parties:

- The parties can **expressly** exclude the application of the last-shot rule under article 6 CISG;

However, the **problem** can arise that parties fail to realize that the CISG is applicable to their contract;

Consequently, they often do not provide for the exclusion of the last-shot rule.

- The parties can **implicitly** waive the application of the last-shot rule. However, they must have an exclusive conduct.

Presumption of the exclusion of the last shot rules as a business standard:

- We can consider that according to a **widely spread business standard and/or trade usages the parties would have preferred the last-shot rule not to be applied to the contract** (art. 6, 7, 8 CISG);

State judges are hesitant to presume the parties' common will to exclude its application;

Therefore, in case of doubt, **they prefer following the safe path** of what is **exactly stipulated** in the contract and applying the last-shot rule instead of the presumed will of the parties.

- In comparison with State judges, the **arbitrator have much more flexibility and margin of appreciation** (idea of art. 1511 CPC).

F. The principle of party autonomy in practice

- **Opting in of CISG**
 - The possibility of *opting in* the CISG by parties established in non-Contracting States
 - PRINCIPLE of *Opting out*: according to article 6 CISG, the parties have the freedom to exclude the application of the CISG
 - EXCEPTION of *Opting in*: the parties (established in not-Contracting States) have the possibility to apply the CISG, even if the legal conditions of Art. 1 are not fulfilled

F. The principle of party autonomy in practice

- **Opting in of CISG**

- The different scope of the contractual clause

- Before a State court

- The clause will only have limited effectiveness
 - The CISG won't be applicable as the general law of the international sales of goods, because the contract is not within the scope of the CISG
 - Therefore, the national law of the State that would be considered as applicable (under the PIL rules / Rome I) will govern the contract as the « lex contractus »

F. The principle of party autonomy in practice

- **Opting in of CISG**

- The different scope of the contractual clause

- Before a State court

- Only if the « *lex contractus* » allows derogations from the general provisions that are applicable, the national State judge will take the provisions of the CISG into account
 - Consequently, the CISG will only be applicable if the national law (« *lex contractus* ») leaves certain matters to the discretion of the parties
 - In this case, CISG can be compared to soft law

F. The principle of party autonomy in practice

- **Opting in of CISG**

- The different scope of the contractual clause

- Before an arbitral tribunal

- The arbitrator (Art. 1511 French CPC) will give a great importance to the choice of law (« rules of law ») made by the parties
 - The arbitrator will consider CISG (opted in) as the *lex contractus*, i.e. the substantive law of the contractual relationship
 - The arbitrator will take national law only into account, if the parties have stipulated that it must be applied as subsidiary law or to fill in gaps not covered by the provisions of the contract
 - The arbitrator will also take into consideration the “rules of law” which it considers appropriate (better-law approach) as well as trade usages (Art. 1511 French CPC)

III. Soft law in international practice

A. Incoterms

B. The notion of Lex Mercatoria

C. UNIDROIT Principles of international Commercial Contracts

A. Incoterms

- **General aspects**
- **Incoterms classification**
- **Structure of Incoterms 2020**
- **Examples of Incoterms**
- **Relationship with CISG and contracts**

A. Incoterms

- **General aspects**
 - Non-binding terms by ICC – only apply if included in contract by parties
 - Clarify roles of seller/buyer : obligations, costs, risk
 - Beyond transport & risk: packaging, customs formalities, invoicing, documentary credits, VAT, cost allocation

A. Incoterms

- **General aspects**
 - Must specify the exact location (e.g., "*FCA Warehouse Paris*" or "*DAP Hamburg Port*")
 - Should be aligned with contract documents and transport arrangements
 - Do not govern:
 - Transfer of title/ownership
 - Contract formation or dispute resolution
 - Payment terms (unless otherwise stated)

A. Incoterms

- **General aspects**
 - Regulated aspects :
 - Transfer of risk
 - Insurance

A. Incoterms

- **General aspects**
 - Regulated aspects :
 - Export packaging
 - Loading charges
 - Delivery to Port/Place
 - Export Duties, Taxes and Customs Clearance
 - Origin Terminal Charges
 - Loading on Carriage
 - Carriage Charges

A. Incoterms

- **General aspects**
 - Regulated aspects :
 - Transfer of risk
 - Insurance
 - Destination Terminal Charges
 - Delivery to destination
 - Unloading on destination
 - Import Duties, Taxes and Customs Clearance

A. Incoterms

- **General aspects**
 - Groups of Terms
 - Maritime only: FAS, FOB, CFR, CIF
 - Multimodal: EXW, FCA, CPT, CIP, DAP, DPU, DDP

A. Incoterms



- **General aspects**
 - Examples :
 - FOB (Free On Board): seller delivers to ship; risk passes at loading
 - CIF (Cost, Insurance, Freight): seller covers transport + basic insurance
 - EXW (Ex Works): buyer assumes all responsibilities from seller's premises
 - DAP/DDP: seller delivers in buyer's country (incl. customs clearance)

A. Incoterms

- **Structure of Incoterms 2020**
 - 2 main categories depending on the mode of transport :
 - Maritime-only terms (for sea and inland waterway transport)
 - Multimodal terms (suitable for all modes of transport, including air, road, rail, and combined transport)

A. Incoterms

- Structure of Incoterms 2020

Incoterms® 2020 Rules Responsibility Quick Reference Guide											
 											
Freight Collect Terms						Freight Prepaid Terms					
Groups	Any Mode or Modes of Transport		Sea and Inland Waterway Transport				Any Mode or Modes of Transport				
Incoterm	EXW Ex Works (Place)	FCA Free Carrier (Place)	FAS Free Alongside Ship (Port)	FOB Free On Board (Port)	CFR Cost and Freight (Port)	CIF Cost Insurance & Freight (Port)	CPT Carriage Paid To (Place)	CIP Carriage & Insurance Paid to (Place)	DAP Delivered at Place (Place)	DPU Delivered at Place Unloaded (Place)	DDP Delivered Duty Paid (Place)
Transfer of Risk	At Buyer's Disposal	On Buyer's Transport	Alongside Ship	On Board Vessel	On Board Vessel	On Board Vessel	At Carrier	At Carrier	At Named Place	At Named Place Unloaded	At Named Place
Obligations & Charges:											
Export Packaging	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller
Loading Charges	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller
Delivery to Port/Place	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller
Export Duty, Taxes & Customs Clearance	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller
Origin Terminal Charges	Buyer	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller
Loading on Carriage	Buyer	Buyer	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller	Seller
Carriage Charges	Buyer	Buyer	Buyer	Buyer	Seller	Seller	Seller	Seller	Seller	Seller	Seller
Insurance	Negotiable	Negotiable	Negotiable	Negotiable	Negotiable	*Seller	Negotiable	**Seller	Negotiable	Negotiable	Negotiable
Destination Terminal Charges	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Seller	Seller	Seller	Seller	Seller
Delivery to Destination	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Seller	Seller	Seller
Unloading at Destination	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Seller	Seller
Import Duty, Taxes & Customs Clearance	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Buyer	Seller

A. Incoterms

- **Structure of Incoterms 2020**
 - Maritime-only terms (for sea and inland waterway transport) :
 - FAS (Free Alongside Ship)
 - FOB (Free On Board)
 - CFR (Cost and Freight)
 - CIF (Cost, Insurance, and Freight)

A. Incoterms

- **Structure of Incoterms 2020**
 - Multimodal terms (suitable for all modes of transport, including air, road, rail, and combined transport) :
 - EXW (Ex Works)
 - FCA (Free Carrier)
 - CPT (Carriage Paid To)
 - CIP (Carriage and Insurance Paid To)
 - DAP (Delivered At Place)
 - DPU (Delivered at Place Unloaded) – *new in 2020, replaces DAT*
 - DDP (Delivered Duty Paid)

A. Incoterms

- **Structure of Incoterms 2020**
 - Key elements defined by each Incoterm :
 - The point at which risk transfers from seller to buyer
 - The allocation of transportation and insurance costs
 - Responsibilities for customs export/import formalities

A. Incoterms

- **Incoterms classification**

- **E-Class - EXW (*Ex Works*):**

- The most suitable Incoterm clause for the exporter (seller)
 - The seller has duly delivered the goods as soon as they have been made available to the buyer at seller's own premises (*ex works*)
 - The seller only bears the risks related to the packaging of the goods
 - The transfer of risk occurs when the goods are made available to the buyer at the seller's premises (*ex works*)
 - Transport is at the expense and risk of the buyer
 - Recommended clause for intra-EU trade (no customs export formalities)

A. Incoterms

- **Incoterms classification**

- **Class F: FCA (*free carrier*), FAS (*free along the ship*), FOB (*free on board*)**
 - The seller must deliver the goods to the carrier or another person appointed by the buyer, at the seller's premises or at any other duly designated place
 - The seller bears the risk of loss or damage that the goods may suffer until they have been delivered to the carrier (ship / board)
 - Customs formalities are the responsibility of the seller, the buyer chooses the mode of transport and the carrier
 - The FAS and FOB clauses are only used in maritime and inland waterway transport

A. Incoterms

- **Incoterms classification**

- **Class C : CPT (*Carriage paid to*), CFR (*Cost and freight*), CIP (*Carriage insurance paid*) or CIF (*Cost insurance and freight*)**
 - The seller must conclude a contract of transport at his own expense in order to ensure the transport of the goods to the agreed place
 - The seller fulfils its delivery obligation when he delivers the goods to the carrier
 - CPT and CIP: the transfer of risk takes place at the time when the goods have been handed over to the carrier designated in the contract (to the first carrier in the case of multiple carriers)
 - CFR and CIF: the transfer of risk occurs when the goods are delivered on board the ship to the port of shipment

A. Incoterms

- **Incoterms classification**
 - **Class D: DAP (*Delivered at place*), DAT (*Delivered at terminal*) and DDP (*Delivered duty paid*)**
 - The seller is responsible for and bears the risk of all operations related to transport until delivery to the buyer at the agreed place of delivery
 - Unloading at the agreed destination is at the seller's expense
 - DDP: the seller is also responsible for all import formalities and the resulting duties and taxes
 - DDP: most favorable clause for the importing company

A. Incoterms

- **Relationship with CISG and contracts**
 - Incoterms complement the CISG and are often integrated into contracts governed by CISG
 - They help to fill gaps regarding delivery, risk, and cost allocation not detailed in the CISG
 - If both are used, they must be harmonized to avoid inconsistencies

III. Soft law in international practice

B. Lex Mercatoria

C. UNIDROIT Principles

B. Lex Mercatoria

- **The notion of Lex Mercatoria**
- Michael PRYLES, Application of the Lex Mercatoria in International Commercial Arbitration: list of the « *20 key principles of the lex mercatoria* » (according to Lord Mustill)
 - Party Autonomy
 - Pacta Sunt Servanda
 - Good Faith
 - Reasonableness
 - Certainty
 - Impartiality
 - Flexibility
 - Efficiency
 - Uniform Interpretation
 - Freedom from Formalism
 - Freedom to Adopt Model Rules
 - Binding Effect of Trade Usages
 - Duty to Mitigate
 - Proportionality
 - Duty to Cooperate
 - Finality of Awards
 - Enforceability
 - Non-Retroactivity
 - Comity
 - Predictability

B. Lex Mercatoria

- **The notion of Lex Mercatoria**
 - ICC statistics: out of a total of 1228 awards less than 30 (2.5%) expressly mentioned the « lex mercatoria » as the rule of law applicable to the contract (E. Jolivet, *La jurisprudence arbitrale de la CCI et la lex mercatoria*, GP.2001 doctr.653)
 - ICC Award No. 10422 in 2001: possible to « *refer to the principles relating to Unidroit's international commercial contracts for questions relating to the general regulation of contracts* »
 - Decree of 13 january 2011: Arbitrators apply the « rules of law » (art. 1511 CPC) or act in an amicable manner (“*amiable compositeur*”)

C. UNIDROIT Principles

- Preamble (purpose of the principles)
- Chapter 1: General provisions
- Chapter 2: Formation of the contract and power of representation
- Chapter 3: Validity
- Chapter 4: Interpretation
- Chapter 5: Content of the contract and third party rights

C. UNIDROIT Principles

- Chapter 6 : Enforcement
- Chapter 7: Non-performance
- Chapter 8: Compensation
- Chapter 9: Assignment of receivables, payables and contracts
- Chapter 10: Limitation periods

C. UNIDROIT Principles

- **Model clauses for the use of the Unidroit Principles**
 - Choose the Unidroit Principles as the law governing the contract **(1)**
 - international commercial arbitration
 - Designate only the Unidroit Principles **(1.1)**
 - Choose the Unidroit Principles supplemented by domestic law **(1.2)**
 - Choose the Unidroit Principles supplemented by the acknowledged principles of international trade law **(1.3)**
 - Incorporate the Unidroit Principles as clauses of the contract **(2)**
 - Refer to the Unidroit Principles to interpret and supplement the CISG when it is chosen by the parties **(3)**
 - Refer to the Unidroit Principles to interpret and supplement the applicable domestic law **(4)**

IV. Negotiation and legal design of international contracts

- **What is an « international contract » ?**
- **What are the specific international clauses ?**
- **How to negotiate an « international contract »?**
- **How to optimize the legal design of international sales of goods contracts under CISG**

IV. Negotiation and legal design of international contracts

- What is an « international contract » ?
 - General legal approach: « *extraneous element* »
 - *National and European PIL (Brussels I and Rome I Regulations)*
 - Specific legal approach: cross border establishment
 - *UN Convention on the International Sales of Goods of 11 April 1980 (CISG)*
 - Economic approach: « *movement of goods, services or payment across borders* ».
 - *International commercial arbitration*

IV. Negotiation and legal design of international contracts

- **What are the specific clauses ?**
 - Arbitration clause (1)
 - Confidentiality clause (2)
 - Currency clause (3)
 - Force majeure clause (4)
 - General Terms and Conditions Acceptance Clause (5)
 - Governing law clause (6)

IV. Negotiation and legal design of international contracts

- **What are the specific clauses ?**

- Hardship clause (7)
- Hold harmless clause (8)
- Jurisdiction clause (9)
- Liability clause (10)
- Non-compete clause (11)
- Termination clause (12)

IV. Negotiation and legal design of international contracts

- (1) Arbitration clause :

- Allows disputes to be resolved outside of state courts
- Faster and more efficient proceedings
- More flexible procedure organization
- More discreet (confidential)
- More expertise (due to the experience and specialization of the arbitrators)
- Hybrid clauses
 - ✓ Arbitration + Mediation
 - ✓ Arbitration vs. State Court proceedings (depending on the dispute value)

IV. Negotiation and legal design of international contracts

- (2) Confidentiality clause

- Synonymous : non-disclosure clause / agreement (NDA)
- Protects sensitive information
- Prevents the other party from disclosing or using confidential information
- Helps maintaining the company's competitiveness

IV. Negotiation and legal design of international contracts

- **(3) Currency clause :**
 - Reduces uncertainty related to exchange rates and secures payment between foreign partners
 - Helps to anticipate and manage financial risks related to currency fluctuations

IV. Negotiation and legal design of international contracts

- **(4) Force majeure clause :**
 - Protects if an unforeseen external event (such as a natural disaster, strike, or health crisis) prevents the party from fulfilling its obligations
 - Allows to temporarily suspend or cancel the contract without penalty in exceptional circumstances

IV. Negotiation and legal design of international contracts

- **(5) General Terms and Conditions Acceptance Clause :**
 - Confirms the application of the GTC of one of both parties containing in particular very specific clauses related to (e.g.) the choice of applicable law, the determination of jurisdiction in the event of a dispute, the liability regime
 - Reduces any ambiguity, especially when the contracting parties come from countries with different legal systems
 - Enhances the legal certainty of the contract and limits the risk of disputes

IV. Negotiation and legal design of international contracts

- **(6) Governing law clause:**
 - One of the most crucial clauses in an international contract
 - Choice of the applicable law shall be express and clear (e.g. as concerns exclusion or not of CISG)
 - Governing law clause can comprise several national laws that shall be attributed to different aspects of the contract (“*dépeçage du contrat*”)
 - Governing law clause can also make reference to soft law (in particular when complemented by arbitration clause)

IV. Negotiation and legal design of international contracts

- (7) Hardship clause :
 - Hardship clauses allow the terms of the contract to be adjusted if unforeseen circumstances make its performance too difficult or too costly
 - Hardship clauses may permit to find common ground with the contracting party without having to terminate the contract
 - Hardship clauses must be drafted in accordance with Force Majeure clauses as well as the statutory provision (of the applicable law) based on the principle “*regula rebus sic stantibus*” (= under French law: *théorie de l’imprévision*)

IV. Negotiation and legal design of international contracts

- (8) Hold harmless clause:

- Hold harmless clauses shall protect a contracting party in the event of a (justified) claim by a third party : under this clause, the other party will be responsible for handling the third-party-claim on its behalf and will “liberate” the contracting party from this issue
- Hold harmless clauses do not act against the third party that made the (justified) claim but transfers the burden of liability and costs associated with certain risks to the co-contractor
- Very common in subcontracting, distribution and transnational service contracts

IV. Negotiation and legal design of international contracts

- (9) Jurisdiction clause :

- Jurisdiction clauses determine which national State court will have (exclusive) jurisdiction to resolve disputes
- Parties may designate the State court of the country of one of the parties or or a neutral court
- It is possible to refer solely to the State courts of one country in general (*“German Courts shall have jurisdiction”*) without precisising the local Court
- Parties also may designate the State court “of the defending party”
- Possibility to sign a hybrid clause: combination of arbitration and jurisdiction clause depending on the value of the dispute
- Problem: legal validity of the so-called asymmetric jurisdiction clause conferring an option to one party between the chosen jurisdiction and “all other competent jurisdictions”

IV. Negotiation and legal design of international contracts

- (10) Liability clause :

- Liability clauses are used to rule out certain types of contractual breaches (degree of responsibility) and to exclude certain types of damages (e.g. indirect damages / gain losses)
- Liability clauses allow to exclude or to limit the financial consequences if one of the parties fails to fulfill its commitments
- The legal validity of liability clauses shall be appreciated regarding to the statutory provisions (national case law) of the applicable law (subsidiarily applicable law in CISG governed contracts)

IV. Negotiation and legal design of international contracts

- (11) Non-compete clause:

- Non-compete clauses prevent the other party (e.g., the distributor or co-developer) from directly competing with the others party during or after the term of the contract.
- Non-compete clauses allow to prevent trade secrets, business strategies & business relationships from unfair competition
- The drafting of non-compete clauses shall be done in accordance with the (mandatory) statutory provisions of the applicable law (there may be legal obligation to pay a compensation to the other party)

IV. Negotiation and legal design of international contracts

- (12) Termination clause :

- Termination clauses define the conditions under which the contract can be terminated without incurring penalties etc.
- In order to avoid the French “sudden termination rule” of contractual established relationship (art. 442 I 2 French Commercial Code) it is recommendable to foresee a notice period of “18 months”
- Termination clauses shall also precise the contractual obligations of each party for the period
 - ✓ until effectiveness of the termination (e.g. restitution of property)
 - ✓ after effectiveness of termination (e.g. supply service, confidentiality)

IV. Negotiation and legal design of international contracts

- **How to negotiate an « international contract »?**
 - Pre-contractual negotiation phase
 - Non-disclosure agreement
 - Letter of intent (LOI) – Memorandum of Understanding (MOU)
 - Specificities relating to international contracts
 - Jurisdictional framework : choice of jurisdiction or arbitration
 - Legislative framework : CISG and choice of subsidiary applicable national law
 - Linguistic framework : language priority clause

IV. Negotiation and legal design of international contracts

- **How to optimize the legal design of international sales of goods contracts**
 - Drafting the contract with the intent to satisfy to the client's individual needs (it will be necessary to override the legal "neutral" conception of the CISG)
 - Choosing CISG as the applicable legal regime for international sale of goods contracts
 - Designing (e.g.) the material / substantive rules fo Swiss law as a subsidiary applicable law (in particular with regard to the validity of contractual clauses derogating from the legal conception of the CISG)

V. International Distribution

A. International Distribution as a Contractual Phenomenon

1. Definition and Schemes of Distribution
2. Private international Law Rules

B. International Distribution as an Extra-Contractual Phenomenon

1. Defect Products Liability
2. Abrupt Termination of Commercial Relations

A. International Distribution as a Contractual Phenomenon

1. Definition and Schemes of Distribution

- **Distribution by sales agent**
- **Distribution by contractual chain**

1. Definition and Schemes of Distribution

- **General aspects of distribution by sales agent**
 - Definition of sales agent: self-employed intermediary with authority (or not) to negotiate/conclude sales on behalf of principal
 - No ownership: agent does not take title to goods
 - If contractually foreseen, agent acts in the name of principal

1. Definition and Schemes of Distribution

- **General aspects of distribution by sales agent**
 - Three parties : principal, agent, customer (= third party)
 - Agent duties towards principal: promote sales, report material facts, avoid conflicts
 - Limited agent duties towards customer (e.g. fairness)

1. Definition and Schemes of Distribution

- **General aspects of distribution by sales agent**
 - Directive 86/653/EEC: harmonization of commercial agency law
 - Agent's rights following termination by the principal:
 - Indemnity or;
 - Compensation
 - Financial consequences due to different transposition in national law:
 - France: indemnity on the basis of 2 years of commissions
 - Germany: compensation on the basis of the concrete financial loss within the limit of 1 year of commissions

1. Definition and Schemes of Distribution

- **General aspects of distribution through supply (contractual) chain**
 - Definition
 - Supply chain : export company -> import company -> reseller -> customer
 - Each member of the chain purchases and resells products
 - Remuneration by margin of each sales transaction
 - Distributor owns goods and bears resale risk

1. Definition and Schemes of Distribution

- **General aspects of distribution by supply (contractual) chain**
 - Main forms
 - Exclusive Distribution : distributor has exclusive rights for its territory
 - Selective Distribution :
 - supplier sells to selected distributors
 - supplier sets quality or control conditions (e.g. luxury sector)

1. Definition and Schemes of Distribution

- **General aspects of distribution by supply (contractual) chain**
 - Franchising
 - Franchisor licenses brand and know-how
 - Franchisee :
 - ✓ buys products from franchisor
 - ✓ pays fees/royalties
 - ✓ operates as independent business

2. Private International Law Rules

- **Jurisdiction (Brussels I bis Regulation)**
 - Article 25 : prorogation of jurisdiction by agreement
 - Article 7(1) : Special jurisdiction for contracts (place where the services are / should be provided)
 - Article 4 : Domicile of defendant

2. Private International Law Rules

- **Applicable Law**
 - Distribution by commercial agent : Hague Convention of 1978
 - Distribution within the supply chain : Rome I Regulation

2. Private International Law Rules

- **Applicable Law : Hague Convention of 1978**
 - France is a contracting State (with Argentina, Netherlands and Portugal) ; entered into force on May 1, 1992
 - Applies to international agency contracts : in particular the contractual relationship between principle and agent
 - Choice of law (art. 5)
 - Law chosen by principal and agent applies
 - Choice can be express or implied
 - Governs formation, duties, authority, termination

2. Private International Law Rules

- **Applicable Law : Hague Convention of 1978**
 - Lack of choice (Art. 6)
 - Law of agent's business location applies
 - Exception: if agent mainly acts in principal's country → that law applies

2. Private International Law Rules

- **Applicable Law : Hague Convention of 1978**
 - Covered Issues (Art. 8)
 - Authority of agent
 - Liability beyond authority
 - Sub-agents
 - Non-compete clauses
 - Termination rights
 - Clientele indemnity (e.g. French "*indemnité de clientèle*")
 - Recoverable damages

2. Private International Law Rules

- **Applicable Law : Rome I Regulation**
 - Article 3 : Freedom of choice
 - Article 4(2) : Lack of choice
 - ✓ Franchise contract : law of the country where the **franchisee** has his habitual residence (art. 4(2) lit. e)
 - ✓ Distribution contract : law of the country where the **distributor** has his habitual residence (art. 4(2) lit. f)

B. International Distribution as an Extra-Contractual Phenomenon

- 1. Defective Products Liability**
- 2. Sudden or Abrupt Termination of Commercial Relationships**

1. Defective product liability

- **Jurisdiction**

- Art 7(2) Brussels I bis : courts for the place where the harmful event occurred or may occur

1. Defective product

- **Applicable Law**
 - EU States (besides France *et al.*) have jurisdiction : **Rome II Regulation**
 - France : **Hague Convention of 1973**

1. Defective product

- Rome II Regulation (art. 5)

	Rule or Applicable Law	Key Conditions / Exceptions
Art. 4 (1)	Law of the <i>place of injury</i>	Irrespective of where the event giving rise to damage occurred or where indirect consequences are felt.
Art. 4 (2)	Law of the <i>common habitual residence</i>	Both the person claimed to be liable and the person sustaining damage
Art. 4 (3)	Escape clause – law of another country	If the tort/delict is “manifestly more closely connected” with another country (e.g. a pre-existing relationship between the parties)
Art. 5	Product liability	Law of the country where: (a) the person sustaining damage had its habitual residence , provided the product was marketed there; OR (b) the product was acquired ; OR (c) the damage occurred .

1. Defective product

- Rome II Regulation

	Rule or Applicable Law	Key Conditions / Exceptions
Art. 14	Party autonomy	The parties may agree to submit non-contractual obligations to the law of their choice (must be agreed <u>after</u> the event or between professionals)
Art. 16	Overriding mandatory provisions (<i>lois de police</i>)	Application of the chosen/applicable law may be overridden by the mandatory rules of the forum or other legislation
Art. 26	Public policy (ordre public)	Application of a provision of foreign law may be refused if manifestly incompatible with the public policy of the forum.
Art. 28	Relationship with existing international conventions	Rome II does not prejudice the application of international conventions to which one or more MS of the EU were parties when Rome II was adopted : → 1973 Hague Convention

1. Defective product

- Hague Convention of 1973 (defect products liability)

	Rule or Applicable Law	Key Conditions
Art. 4	Law of the <i>place of injury</i>	If that State is also: (a) habitual residence of the victim, OR (b) principal place of business of the defendant, OR (c) place of acquisition of the product.
Art. 5	Law of the <i>victim's habitual residence</i>	If that State is also: (a) principal place of business of the defendant, OR (b) (b) place of acquisition of the product
Art. 6	Law of the <i>defendant's principal place of business</i>	If neither Art. 4 nor Art. 5 applies. BUT the claimant may instead choose the law of the place of injury .
Art. 7	Exclusion of foreseeability	Even if Art. 4–6 determine the applicable law, it does not apply if the defendant could not reasonably foresee the product being marketed there.
Art. 8	Scope of the applicable law	
Art. 9	Safety and conduct rules	Even when another law applies, courts may still consider the safety standards of the State where the product entered the market.

2. French « sudden termination » rule (art. L. 442-1 II C. com)

- Sudden termination of long-term commercial relationships without adequate notice is considered as unfair / abusive

*“II.-Holds the perpetrator liable and obliges them to **compensate for the damage** caused by any person engaged in production, distribution, or service activities who **abruptly terminates, even partially, an established commercial relationship**, without written notice that takes into account, in particular, the duration of the commercial relationship, with reference to commercial practices or interprofessional agreements, and, for the determination of the price applicable during its duration, the economic conditions of the market in which the parties operate.*

*In the event of a dispute between the parties over the length of the notice period, the party responsible for the termination cannot be held liable for an insufficient notice period if it has given **eighteen months'** notice.*

The provisions of this II shall not preclude the right to terminate without notice in the event of non-performance by the other party of its obligations or in the event of force majeure.”

2. French « sudden termination » rule (art. L. 442-1 II C. com)

- Several questions on PIL:
 - Contractual vs. Extra-contractual qualification:
 - Article 7(1) vs. 7(2) Brussels I bis
 - Rome I vs. Rome II
 - French sudden termination rule as an “overriding mandatory provision” (*loi de police*) according to art. 9 of Rome I
 - Validity of a jurisdiction clause in favor of a foreign jurisdiction that does not recognize French sudden termination rule as an overriding mandatory provision

Thank you for your attention !



Sans limites.

Ohne Grenzen.

Without limits.

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